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No. ~~1221~~ 95

In the
Supreme Court of the United States
OCTOBER TERM, 1969

STATE OF WISCONSIN,

Appellant,

vs.

NORMA GRACE CONSTANTINEAU,

Appellee.

On Appeal From The United States District Court
For The Eastern District of Wisconsin

BRIEF FOR THE APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1211

STATE OF WISCONSIN,

Appellant

vs.

NORMA GRACE CONSTANTINEAU,

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF WISCONSIN

BRIEF OF APPELLEE

JURISDICTION

The appellee commenced the action below under 42 U.S.C. 1983 and 28 U.S.C. 1343, alleging damages due to the deprivation of rights guaranteed her by the United States Constitution, and further sought injunctive relief under sec. 28 U.S.C. 2281 and 2284 to enjoin the actions of defendant Grager taken by him under the statutes herein involved; namely, Wisconsin Statutes sec. 176.26 and 176.28. The United States Supreme Court has jurisdiction to review the decision

of the 3 Judge District Court by direct appeal pursuant to 28 U.S.C. 1253 and 2102(b). Probable jurisdiction was noted on March 23, 1970.

QUESTIONS PRESENTED

1. Does a citizen have a right to maintain his or her reputation free from State infringement, and if so, is this a basic, fundamental right that is constitutionally protected, or is that right of a non-constitutional nature that may be taken from her by State action?
2. If that right of the citizen to maintain her reputation free from state infringement is not a basic, fundamental right that is constitutionally protected, can the state infringe or dispare that right without the customary notice and hearing requirements of the procedural due process safeguards of the 14th Amendment, Sec. 1, of the Federal Constitution?
3. If the right of a citizen to maintain her reputation free from state infringement is not a basic, fundamental right that is constitutionally protected, can the state infringe that right when it is joined with the admittedly non-constitutionally protected right to receive and use alcoholic beverages, without notice and hearing of such intended state action?

SUMMARY OF ARGUMENT

Every citizen of a free society has various rights of both a constitutional nature which may never be abridged under any circumstances (e.g., the right to bail, the right to a free exercise of religion) and others of a non constitutional nature which he possesses as a member of such society but which, when proper safeguards in proper proceedings are applied, may be removed or restricted from him (e.g. the right to use the highways; the right to go to school), such safeguards and proceedings being based in the due process concept. In the case on appeal, appellee's position is that every citizen has a basic fundamental right, emanating from the Bill of Rights and enforceable against State action by the 14th Amendment Due Process Clause, to maintain his or her reputation free of State infringement, which right, although not expressly stated in the Bill of Rights, is to be read therein by implication to give meaning to the express guarantees therein, and that such right is a necessary ingredient for the concept of ordered liberty in a free society. Griswold v. Connecticut (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L ed 2d 510.

The^r right to use and receive alcoholic beverages, appellee admits, has no constitutional source, but that such right, when coupled with another right, the right of the citizen to maintain her reputation free from state infringement, (even if such right is deemed not to be such a fundamental right as can not be infringed upon by the State under any circumstances) or even without such other, and more valuable right, cannot be removed from appellee without giving her the chance to be advised of the reasons

for such contemplated revocation, and permitting her to face and cross examine her accusers. The operation of the statutes in question by acting against these dual rights of the citizen, causes an overwhelming preponderance in favor of the interest of the citizen affected and against the State function and interest results under the test of Cafeteria & Restaurant Workers v. McElroy (1961) 367 U.S. 886, 81 S. Ct. 1743 6 L.ed 2d 1230, wherein the question of injury to the citizen's reputation is so inextricably intertwined with the question of the citizen's other rights under the statutes herein involved, as to be impossible to be excluded from a fair consideration of the issues presented.

ARGUMENT

I.

EVERY CITIZEN HAS A BASIC, FUNDAMENTAL RIGHT OF MAINTAINING HIS OR HER REPUTATION FREE FROM STATE INFRINGEMENT, WHICH RIGHT IS CONSTITUTIONALLY PROTECTED.

Although no mention is expressly made in the Constitution or in the Bill of Rights concerning the right of a citizen to his or her reputation and the bar of the State from infringing or injuring the same, Appellee's basic position is that such right, with such protection against State action attached therewith, is a vital element of the concept of ordered liberty, protected against state action by the due process clause of the 14th amendment, and that no action of the type herein sanctioned under the objected to statutes could be justified even with notice and a hearing. See Griswold v. Connecticut (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L.ed 2d 510 and Aptheker v. Secretary of State, (1964), 378 U.S. 500, 84 S. Ct. 1659, 12 L. ed 2d 992, referring to other constitutional rights of a fundamental nature, not expressly stated in the Bill of Rights or Constitution, but by implication read therein as necessary to make the stated guarantees meaningful. Basically, the right of a citizen to his or her reputation and the protection of the same from State action is basic and essential to the extent that any action against the said right by the State causes an immediate withering of the citizen's other well established constitutional rights. Action by the state against the name and reputation of the citizen, for instance, in the objected to statutes, prods other citizens to disassociate

from the posted individual by her tacitly being denied admission to certain public places where her name appears, where such other individuals are forbidden to deal with her, and further extends to such other private areas where the citizen could receive the beverages in a similiar manner, thus infringing on the posted citizen's right of free association, guaranteed to her under the first amendment. N.A.A.C.P. v. Buttons, (1963), 371 U.S. 415, 83 S. Ct. 328, 9 L. ed 2d 405; Shelton v. Tucker (1960), 364 U.S. 479, 81 S. Ct. 247, 5 L. ed 2d 231. The public display of her appellation with innuendos therewith referring to intempered personal habits invades the citizen's peace of mind and, consequently, her right of privacy, guaranteed her under the 9th amendment. Griswold v. Connecticut (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed 2d 510; Fairfield v. American Photocopy Equipment Co. (1955 Cal. App.), 291 P2d 194, 138 Cal. App. 82. Although the foregoing examples of damages accruing to appellee in the form of infringement of other recognized constitutional rights, from the operation of the objected to statutes herein is thus seen, it is brought out by appellee not merely to show the invalidity of these statutes under the aforesaid constitutional protections applied against the States by the due process clause of the 14th amendment, but to further show that the interest of a citizen in the maintenance of her reputation is of such an essential and basic nature that it should be read by implication into the Bill of Rights so as to be unabridgeable by State action via the 14th amendment bar. Although the United States Supreme Court has never explicitly stated that the right of a citizen to maintain her reputation free from State action is a constitutionally protected right emanating from the Bill of Rights and the

14th amendment, in Rosenblatt v. Baer (1965), 383 U.S. 75 86 S. Ct. 669, 15 L. ed 2d 597, said right was recognized, howbeit not specifically of a constitutionally based nature: (p. 92):

"It is a fallacy, however, to assume that the first amendment is the only guidepost in the area of state defamation laws. It is not. As the Court says, "important social values...underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the 9th and 10th amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system." (Concurring opinion).

See also 53 C.J.S. Libel and Slander, sec. 4, p. 39. The tacit recognition of the right of maintaining and keeping one's reputation though not applied to state action in Rosenblatt, supra, nor explicitly stated to have constitutional sources to make it unabridgeable by State action, nevertheless indicates said right is of a basic nature that pertains to the social, legal and economic benefit of each member of society, Griswold v. Connecticut (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed 2d 510, and from an examina-

tion of the traditions and collective conscience of our people, such right of keeping and maintaining one's reputation free from state infringement is so rooted therein to be ranked as fundamental. See Concurring opinion of Justice Goldberg in Griswold, *supra*. In Kennedy v. Item Co. (1948), 213 La. 347, 34 S2d 886, 890 it was noted:

"The very foundation upon which the law of libel is laid is the protection of reputation. The right to a good name and fame is as absolute and essential to the "pursuit of happiness" as is the right to life and liberty, characterized in our Declaration of Independence as among those "inalienable rights which all men, being created equal, are endowed by their creator."

See also Marion v. Davis (1927), 217 Ala. 16, 114 S. 357. In pleading that the action of the chief of police violated appellee's constitutional rights, appellee made specific reference to her rights under the 14th and 9th amendment (App. 103-4). However, the right of maintaining one's reputation free from State infringement could rest in the due process clause of the 14th amendment alone, in the 9th amendment imposed upon the states by the 14th amendment due process clause, or in the 1st amendment due process clause, all of which have been espoused in Griswold v. Connecticut, *supra*.

Appellee notes the wide privilege granted to critics of both public figures and public officials to protect the said critics from restrictions otherwise imposable against them under libel laws, in order to foster freedom of the press, free speech and free discussion. New

York Times v. Sullivan, (1964), 376 U.S. 254, 84 S. Ct. 710, 11 L. ed 2d 686, 95 A.L.R. 2d 1412, Curtis Publishing Co. v. Butts, (1967), 388 U.S. 130, 87 S. Ct. 195, 18 L. ed 2d 1094, reh. den/ 389 U.S. 889, 88 S. Ct. 11, 19 L. ed 2d 197. However, the reverse should not be held valid when public officials criticize or use their position to bring the name or reputation of the private citizen into ridicule. The need for "breathing room" for free speech and discussion is absent in the latter case, and, in its place is the need of the private citizen not to be the subject of official scrutiny, public example, shame and other outworn concepts, that cause injury to reputation and name.

Such vital interest of the citizen in his reputation must be of the fundamental nature to be ranked and included within those basic concepts whose existence must be read into the Bill of Rights in order to make the express guarantees therein meaningful.

II.

EVEN IF THE RIGHT OF THE CITIZEN TO MAINTAIN HIS OR HER REPUTATION IS NOT A BASIC CONSTITUTIONAL RIGHT OF A FUNDAMENTAL NATURE, NEVERTHELESS, IN SUCH INSTANCE, SUCH RIGHT CANNOT BE INFRINGED UPON BY STATE ACTION WITHOUT MEETING PROCEDURAL DUE PROCESS SAFEGUARDS, PARTICULARLY WHERE, AS HERE, SAID RIGHT IS COUPLED WITH THE RIGHT TO RECEIVE AND USE ALCOHOLIC BEVERAGES.

Appellee's alternative position is two fold: first, that the statutes, by providing no provision for notice of the intended action by the persons authorized to act by statute with stated reasons

or basis of the proposed action and by making no provision for a hearing on the merits of the same, violate the procedural due process requirements of the 14th amendment by their resulting operational effect in the denial of the citizen's right to use and receive alcoholic beverages and, secondly, even if the citizen has no fundamental, constitutionally protected right to maintain her reputation free from state infringement, nevertheless, such right, when coupled and so inextricably intertwined with the right to use and receive alcoholic beverages, as said rights are so closely related in the objected to statutes, such dual rights cannot be infringed upon by the State without procedural due process safeguards.

The statutes herein involved grant the power to control specified activities of certain citizens in relation to the use and receipt by said citizens of alcoholic beverages under the threat of criminal sanctions, so as to result in the withholding of said beverages from the citizens whose conduct is sought to be regulated, and whose freedom, resultingly, is restricted. Wisconsin Statutes Vol. 1, secs. 176.26 and 176.28. The power to so limit the liberty of the citizen has the single guideline of applicability to citizens whose estate is lessened or wasted by drinking, and the power to limit such liberty is granted to legislative bodies (town supervisors, village trustees), administrative officials (mayor, county superintendent of the poor, chairman of the county board, district attorney), ministerial officers (chief of police) and citizens without any authority of official capacity (wife). Although in the instant case it was a ministerial officer who, without notice of the action and stated reasons for him to do so, and without

a hearing, acted to limit appellee's liberty with respect to her use and receipt of alcoholic beverages for one year, the Supreme Court may consider all possible applications of the statute in other factual situations besides that at bar. N.A.A.C.P. v. Buttons (1963), 371 U.S. 415, 432, 83 S. Ct. 328, 337, 9 L. ed 2d 405, 418. In the case of a ministerial officer it has been held that when such an officer is granted, by legislative act, the power to interfere with certain rights of citizens, such act is void, State v. Bulot, (1932), 175 La. 21, 142 S. 787 (holding it to be a judicial function to determine if an assembly is peaceable or unlawful and an act granting unto police officers the power to do so being void).

The right under consideration at this point is the right to receive and use a particular type of personal property, alcoholic beverages. Appellee makes no contention that the State cannot restrict a citizen's use of alcoholic beverages or terminate the same, as said right has no constitutional source that would prohibit state action to that effect; nevertheless, appellee asserts, such action on behalf of the state can only be done in a manner consistent with procedural due process, Joint Anti-Facist Refugee Committee v. McGrath (1950), 341 U.S. 123, 71 S. Ct. 624, 95 L. ed2d 817, and in a manner that does not unnecessarily destroy protected freedoms at the same time. Griswold v. Connecticut (1965), 381 U.S. 479, 85 S. Ct. 1678, 14 L. ed 2d 510; Shelton v. Tucker (1960), 364 U.S. 479, 488, 81 S. Ct. 247, 5 L. ed 2d 231; Louisiana v. N.A.A.C.P. (1961), 366 U.S. 293, 81 S. Ct. 1333, 6 L. ed 2d 301. The apparent desire of the objected to statutes herein, namely, to keep low income families off public

welfare by restricting their right to the use of alcoholic beverages could be accomplished by the traditional enforcement of the Wisconsin criminal laws enforcing non support and drunkenness. See Wisconsin Statutes Vol. I secs. 52.05 and 52.055 and Vol. II, sec. 947.03. As was stated in the majority opinion in Griswold, supra:

"It concerns a law which. . . seeks to achieve its goals by means having a maximum destructive effect upon that relationship. Such a law cannot stand in the light of the familiar principle so often applied by this Court that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Enforcement of the criminal laws of Wisconsin, aforementioned, provides a judicial forum for the testing of the truth or falsity of the charges brought against the person whose conduct is objected to, with the attenuating protection of confrontation and cross examination, and if a finding of guilt were warranted there under, provides for a range of penalties commensurate with the wrong done, unlike the objected to statutes herein whose sanction is a discretionless one year restriction. The writ of certiorari, urged by the State as a means of redressing this wrong, is inapplicable in a situation involving a ministerial officer, since in Wisconsin such writ is only to review administrative and legislative board action. See Wisconsin Statutes Vol. II, Sec. 252.04, Lakeshore Development Commission v. Planning Commission (1961), 12 Wis 2d 560, 107 N.W. 2d 590.

A series of cases evolving around Cafeteria and Restaurant Workers v. McElroy (1961), 367 U.S. 886, 81 S. Ct. 1743, 6 L. ed 2d 1230 lend themselves to the proposition that in certain instances a hearing and notice thereof with the rights of confrontation and cross examination not being necessary. An examination of this case, however, indicates that they deal in limited areas, e.g. the privilege of government employment wherein the employee has no other interest than the employment itself, Cafeteria Workers, supra; Chafin v. Pratt (1966 5 C.A.), 358 F2d 349, cert. den. 385 U.S. 878, 87 S. Ct. 159, 17 L. ed 2d 105; Sessions v. State of Connecticut (1968), 293 F. Supp. 834; where the one denied the hearing was not adversely affected in a legal right: Fugazy Travel Bureau Inc. v. C.A.B. (C.A.D.C. 1965), 350 F2d 733 (holding money and remitting it once a month under government regulation seen as a mere privilege only); Law Motor Freight Inc. v. C.A.B. (1967), 364 F2d 139, cert. den. 387 U.S. 905, 87 S. Ct. 1683, 18 L. ed. 2d 622 and Continental Bank v. National City Bank (E.D. Ohio 1965), 245 F. Supp 684 (private interest involved was merely to be free from competition); Lawton v. Steele (1894), 152 U.S. 133, 14 S. Ct. 499, 38 L. ed. 385 (seizure and destruction of illegal devices where not duly oppressive to individuals); Hosack v. Smiley (D.C. Cal. 1967), 276 F. Supp. 876, (where there is no factual question in issue that hearing could serve to resolve). As was stated by Justice Frankfurter in Joint Anti-Facist Refugee Committee v. McGrath, (1950), 341 U.S. 123, 71 S. Ct. 624 95 L. ed. 817, (p. 172):

"Summary administrative procedures may be sanctioned by history or obvious necessity.

But these are so rare as to be isolated instances . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found generating that feeling, so important to popular government, that justice has been done.

The strength and significance of these considerations—considerations which go to the very ethos of the scheme of our society—give a ready answer to the problem before us. That a hearing has been thought indispensable in so many other situations, leaving the cases of denial exceptional, does not itself prove that it must be found essential here. But it does place upon the attorney general the burden of showing weighty reason for departing in this instance from a rule so deeply imbedded in history and in the demands of justice."

In accord: Morgan v. United States (1938), 304 U.S. 1, 58 S. Ct. 773, 82 L. ed. 129; Sniadach v. Family Finance Corp., (1969), 395 U.S. 337, 89 S. Ct. 1820, 23 L. ed. 2d 349; Opp Cotton Mills v. Administrator (1941), 312 U.S. 126, 61 S. Ct. 524, 85 L. ed. 624; St. Joseph's Stockyards v. United States (1936), 298 U.S. 38, 56 S. Ct. 720, 80 L. ed. 1033; Dixon v. Alabama State Board of Education (1961 5th Cir.), 294 F.2d 150; Ohio Bell Telephone Co. v. Public Utilities Commission (1937), 301 U.S. 292, 57 S. Ct. 724, 81 L. ed. 1093; Armstrong v. Manzo (1965), 380 U.S. 545, 85 S. Ct. 1187, 14 L. ed. 2d 62; Willner v. Committee on Character (1963), 373 U.S. 96, 83 S. Ct. 1175, 10 L. ed. 2d 224.

The difference between the above cited rule of Joint Anti Facist and the exception to the rule of Cafeteria and its satellite cases is clear. The gist of the difference is that in the instant case no privilege is involved but rather a right is at stake,

the right being the right to receive and use alcoholic beverages coupled with, as is pointed out later, the right to maintain one's reputation free from ~~from~~ state infringement without procedural due process safeguards. Although the right to receive and use alcoholic beverages is not a constitutional right to receive and use alcohol beverages is not a constitutional right, it does vest in every free adult citizen of the state and as such differs from the privilege of selling alcoholic beverages, as was the situation in Crane v. Campbell(1917), 245 U.S. 304, 38 S. Ct. 62 L.ed. 304 and from the right of possessing liquor in the form of contraband, as was similarly the situation in Samuels v. McCurdy(1924), 267 U.S. 188, 45 S. Ct. 264, 69 L.ed. 568, two prohibition era cases relied on heavily by the State in its brief, in support of its proposal that the State has an almost unlimited power in the area of alcoholic beverages. The right to receive and use alcoholic beverages is not, as in the case of government employment, a mere privilege subject to the plenary power of the executive, Cafeteria, supra, as no special relation exists between the state and citizen other than governor-governed, the question of a smooth operation of the government's internal affairs being absent. Accordingly, it is submitted that the facts at bar fit the rule rather than the Cafeteria exception. True, the right-privilege distinction has become clouded (See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439(1968), but the lessening of the distinction has served to merge the area of privilege into the constitutional protection of procedural due process that only rights formerly enjoyed. In Sherbert v. Verner(1963), 374 U.S. 398, 83 S. Ct. 1790, 10 L.ed2d 960, a citizen lost her unemployment compensation for refusing to accept Saturday work on account of religious

beliefs. The Supreme Court overruled the contention that such compensation was a privilege and stated:

"Nor may the Courth Carolina Court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right", but merely a "privilege". It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

It may be further seen that the alternative position of Appellee, assumed in the event the Court rules that the right of a citizen to maintain his reputation is not constitutionally protected against State action as a fundamental right is, that the dual rights herein at stake may not be limited, revoked or terminated with the resulting harm done to the citizen without procedural due process protection. Appellant seems to base its position upon the fact that its interest in the control of alcoholic beverages far outweighs the interest of its citizens in obtaining alcoholic beverages so that under the Cafeteria rule of balancing interests no notice or hearing is needed. Appellee asserts that were only the right to receive and use alcoholic beverages at stake, then the argument of the state under said test would merely cause a lesser overbalance towards the side of the citizen than is the situation in the instant case where the additional and dual right of the citizen to maintain her reputation is at stake. The individual's interest herein is salutary: his image in society among his friends, relatives, neighbors, before his peers and his employers and in his own mind is involved, and when such dual right is coupled with the lesser right of obtaining alcoholic beverages, the clear prepon-

derance of the weight under the Cafeteria balance test swings to the side of the citizen. The interest of the state is merely to keep low income persons off public assistance, and with the millions on public assistance from a multitude of reasons, Goldberg v. Kelly(1970) 38 U.S. Law Week 4223, including disability, death and abandonment of the breadwinner, unmarried mothers, the aged etc., these few receiving assistance due to excessive drinking of the breadwinner causes the state's interest to be miniscule. On the other hand, the precious nature of reputation and the "badge of shame" attaching to infringements upon the same has been given recognition by the Courts, requiring, whenever reputation is affected, the requirement of notice and hearing of the issues, even in the exception-to-the-rule area of government employment. Birnbaum v. Trussell(2nd Cir. 1966), 371 F2d 672; Wiemann v. Updegraff, (1952), 344 U.S. 183, 73 S. Ct. 215, 97 L.ed 216; Slochower v. Board of Education(1956), 350 U.S. 551, 76 S. Ct. 637, 100 L.ed. 692. Consequently, an exception to the rule exists when governmental action causes injury to reputation. This was noted as follows: in Birnbaum, supra, (p. 678):

" . . . whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist." (Emphasis added).

Although appellee does not assert that the right to use and receive alcoholic beverages is on a higher level than is the privilege of government employment, nevertheless, it follows that if the two were equated the injury to reputation in the instant case

would be equivalent to the substantial interest in the employment cases which requires notice and hearing. The Badge of Shame furthermore, is so intimately connected not only with a person's economic future but also with his personal and social relationships that appellee sees it as being impossible to limit the procedural due process requirements to only situations where economic harm results from damage to reputation, for in all situations, every aspect of a person's life is affected by such damage, and the proposal to limit procedural due process requirements to instances where economic damage alone arises is at odds with reality.

The suggestions that appellee utilize alternative methods of redress against the state action such as issuing a statement to the press (suggested by the State on p. 26 of its brief) or by seeking political recourse against officials doing the posting (suggested by the State on p. 27) are disturbing, as it infers that access to the courts should be defrayed, thus belittling the efficiency of the judicial system and further suggesting that the quiet dignity of the Courts should be deserted in favor of trial by mass media. Such an argument in actuality fits with the theme of the objected to statutes whereby public declarations by third persons without a judicial forum cause a transfer of justiciable questions from the Courts to a more sensational forum, here the barrooms and gossip corners of the community.

III. CONCLUSION

The issue of injury to reputation was raised by the complaint (App. 102-106) and was properly considered by the Lower Court with the question of procedural due process with which it is inextricably intertwined in the issues of this case, involving the dual rights of appellee, one of which right constitutes the substantial interest of maintaining her reputation uninfringed by State Action, which as appellee primarily submits, in a fundamental, constitutionally protected right which no state may infringe, and which, if the Court deems said right not to be of the fundamental constitutionally protected nature, at least is a right that cannot be infringed by state action without procedural due process safeguards involving notice, hearing and confrontation. As is noted, this right in the instant case is dual with the non-constitutional right of use and receiving alcoholic beverages. To be sure, the Appellant below came prepared at the 3 Judge Court to deal with the question of reputation in that it subpoenaed witnesses who were prepared to testify as to the same (see page 15, appellant's brief), and, although the Court properly refused to allow testimony as to these and other facts (such being a consideration proper only on demand from 3 Judge Court to a single judge, Metcalf v. Swank, (D.C. Ill., 1968), 293 F. Supp. 268), it evidences the fact that the issue of injury to reputation was in the minds of the court and counsel, and, as counsel himself infers on page 15 of his brief, it was error not to consider the point of reputation injury further, by the calling of his witnesses. Finally, it is to be noted that when asked by the Court what his position was on the question of reputation, Appellant's counsel did not below claim said issue was not before the Court (Appendix 112-114) and

thus cannot now raise such objection on appeal. Accordingly, it is respectfully submitted that the Statutes in question herein, as utilized against appellee, result in a deprivation and infringement by State action of appellee's fundamental and constitutionally protected right to maintain her reputation free from state action, or, alternatively, that the substantial interest represented by the citizen's right to maintain her reputation cannot, when coupled with her right to use and receive alcoholic beverages, be restricted, removed or otherwise limited without the procedural due process safeguards of notice and hearing, and that the 3 Judge ruling holding the statutes unconstitutional should be sustained.

S.A.SCHAPIRO
MEMBER OF THE BAR
UNITED STATES SUPREME COURT

June, 1970